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PP v. MOHAMMAD FADIL HANAPI MD SAHIDEK

HIGH COURT MALAYA, MUAR
AWG ARMADAJAYA AWG MAHMUD JC
[APPLICATION FOR REVISION NO: JB-43-3-08-2021]
14 OCTOBER 2021

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Abstract – *A Magistrate or Sessions Judge, in proceeding to hear a criminal trial which has been partly heard, has a complete discretion under s. 261 of the Criminal Procedure Code to either hear the case de novo or continue from the point where it has been left by his predecessor, albeit that the discretion must be properly and reasonably exercised. Where, however, a trial under s. 376(1) Penal Code has been fully heard by a previous Sessions Judge except for the parties' submissions at the end of the defence case, as happened here, it might not be proper nor advisable for the succeeding Sessions Judge to have ordered a de novo trial, considering the multiple adverse repercussions that such a new trial would entail and the fact that the court could always view the full video recording of the trial if needs be; more so when no reason was given for the order, as the absence of reason may always attract the inference that the discretion has been wantonly or callously exercised.*

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CRIMINAL PROCEDURE: *Revision – Application for – Application for revision of decision of Sessions Court Judge ('SCJ') ordering trial to be heard de novo – Whether order had legal ramifications – Whether SCJ indicated reasons for order – Meaning of 'exercise of discretion' – Whether fulfilled – Whether Sessions Court may alter its decision after finding prima facie case had been made out by prosecution – Whether change of judge entailed order that trial be heard de novo – Whether justice of case demanded case be heard de novo – Whether order of SCJ improper and illegal – Whether ought to be set aside*

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This was an application for revision by the Public Prosecutor of the decision of the Sessions Court Judge ('SCJ') in ordering the case (Sessions Court Reference No. JC-62JSK-05-04-2019) to be *de novo*. The respondent was charged under s. 376(1) of the Penal Code before the previous Sessions Court Judge ('previous SCJ'). At the end of the prosecution's case, the previous SCJ ruled that the prosecution had made out a *prima facie* case against the accused and ordered the accused to enter his defence. After several extensions, the decision was then fixed on 14 June 2021 but it had to be postponed due to the movement control order implemented to control the spread of Covid-19. By then, the previous SCJ was transferred to another Sessions Court and his post was assumed by the succeeding SCJ. The decision at the end of the defence was further adjourned. However, the previous SCJ passed away and hence the decision could not be delivered. Subsequently, the case was called

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up by the succeeding SCJ to ascertain the status of the case. The SCJ enquired from all parties on the views of parties in respect of the case. The defence applied to have the case heard *de novo* but no ground was offered. It was vehemently opposed by the prosecution on the grounds that (i) the prosecutrix (victim) would have to re-testify and this would cause a repeat of the trauma that she had gone through earlier, not to mention the incident itself and the prosecution's case; (ii) the prosecutrix had since married and a re-trial would add pressure on her marriage and put her to shame with her in-laws, notwithstanding the proceedings may be conducted *in camera*; (iii) the records of proceedings may be viewed either in the form of video recording or the cold print of the notes; (iv) if the defence was dissatisfied with the prosecution's case, they were entitled to appeal to the High Court; (v) a trial heard *de novo* was not only a waste of time and resources but it was also a form of 'double victimisation' of the prosecutrix; and (vi) re-visiting the decision of the previous SCJ, in calling for the defence to be entered, was contrary to law since it was the decision of the same court notwithstanding the change in personality (coram) presiding over the court. The issues in this application were (i) whether a Sessions Court may alter its decision after it had made a finding that a *prima facie* case had been made out by the prosecution; (ii) whether a change of judge entailed an order that a trial be heard *de novo*; and (iii) whether the justice of the case demanded that the case be heard *de novo*.

Held (setting aside order of Sessions Court Judge to have the trial *de novo*):

(1) When the court exercises its discretion, it has to be done with good reasons or foundation for that decision to be arrived at. This court was unable to find the reasons of the SCJ for the exercise of his discretion. There were legal ramifications which were, amongst others (i) the prosecutrix would be forced to be examined again; (ii) the evaluation of the evidence after the previous SCJ ruled that the prosecution succeeded in proving a *prima facie* case; and (iii) the defence had closed its case after calling its witnesses although no decision had been made. There were other ramifications apart from being legal, in that re-calling and re-examining the prosecutrix may throw the marriage of the prosecutrix to the rocks. When a decision has been made in respect of evidence such as a *prima face* case had been made out by the prosecution. The SCJ did not indicate the reason for his decision notwithstanding the legal ramifications of his decision. Hence, it did not fulfil the meaning of 'exercise of discretion' which could not be exercised wantonly or callously but with reasons that could withstand the test of scrutiny. (paras 50, 53, 54, 55, 56, 61 & 62)

(2) Since the previous SCJ ruled that there had been a *prima facie* case against the accused, it must be taken to the end. It was not for the succeeding SCJ to rule otherwise, no matter what his personal thoughts were. He may choose to do so at the end of the defence case but certainly

on setting aside *ab initio* of his sitting before hearing the defence witnesses. He must, in the words borrowed from the case of *Saad Abas & Anor v. PP* that "it is as good as saying that the Sessions Court Judge himself has decided to call for the defence assuming that he has analysed the case in the way that the preceding Sessions Court Judge has done". Having said that, for the sake of completion, this court agreed for a recall of the defence witnesses so that they could be presented to the new presiding SCJ and this may be done without expunging the records. Hence the witnesses so recalled is subject to scrutiny and they may be subject to impeachment if they give a different version than what was on record. (paras 57-59)

(3) There were video recordings that had the audio as well as video recordings that was at the disposal of the succeeding SCJ. Considerations should have been given on this fundamental point because even the Criminal Procedure Code ('CPC') had been amended to include the video recording as records of proceedings and appellate courts had, more than once, resort to this mode of evidence evaluation. Hence, the excuse that demeanour could not be observed, was a dinosaur that had been fossilised by the avalanche of technology (that had been put into good use, no doubt) and whose bones were studied by students of legal archeology to remind us of the millenia that we no longer have to bear its burden. (paras 65-67)

(4) The order/ruling of the SCJ was improper and illegal as well as incorrect in the face of the law and the facts of the case. This court must exercise its revisionary powers and make the following orders (i) the order of the SCJ to have the trial *de novo* be set aside; (ii) the ruling by the previous SCJ that the prosecution had made out a *prima facie* case against the respondent/accused is restored; (iii) the defence may call their witnesses to the stand and the provisions of s. 173 of the CPC must be complied with, in particular, s. 173(ha) onwards and of course, of any other law in force; and (iv) the presiding SCJ will then evaluate the evidence and make the necessary ruling at the end of the defence case. (para 68)

Case(s) referred to:

Abdul Hamid Udin v. PP [2000] 1 LNS 198 HC ***(refd)***
Adzhaar Ahmad & Anor v. PP [1996] 1 LNS 68 HC ***(refd)***
Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Dorai Manickam Alias Davis v. Rex [1936] 1 LNS 12 HC ***(refd)***
Emperor v. Bar Council Of Gujarat AIR 1981 SC 477 ***(refd)***
Emperor v. Nasrullah & Ors AIR (1928) All 287 ***(refd)***
Hari Ram Seghal v. PP [1980] 1 LNS 116 HC ***(refd)***
Lee v. Bude & Torrington Junction Ry Co [1871] LR 6 CP 576 ***(refd)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Mohd Jalani Saliman & Anor v. PP [1998] 1 CLJ 123 HC ***(refd)***
Murugiah v. PP [1940] 1 LNS 59 HC ***(refd)***
Muzammil Izat Hashim v. PP [2009] 2 CLJ 354 CA ***(refd)***
PP v. Sogas Trading [2020] 4 CLJ 410 HC ***(refd)***
R v. Lachiram ILR 28 Bom 533 ***(refd)***
R v. Metropolitan Police Commissioner [1968] 2 QB 118 ***(refd)***
Re Soo Leot [1955] 1 LNS 127 HC ***(refd)***
Rex v. Low Toh Cheng [1941] 1 MLJ 1 HC ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Yap You Jee v. PP & Other Appeals [2015] 7 CLJ 897 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35(2)
Criminal Procedure Code, ss. 47, 49, 51, 118, 173(ha), 261, 302, 308, 317, 323, 325, 396
Evidence Act 1950, s. 32
Penal Code, ss. 34, 109, 376(1), 420

Other source(s) referred to:
Maxwell on the Interpretation of Statutes, 12th edn, pp 147-148
Words and Phrases Legally Defined, 2nd edn, vol 2, p 82

For the applicant - Pusspa Muraiya; DPP
For the respondent - Syaffie Naim; M/s MN Halim Syaffie & Assocs

[Editor's note: Appeal from Sessions Court; Case No: JC-62JSK-05-04-2019.]

Reported by Suhainah Wahiduddin

JUDGMENT

Awg Armadajaya Awg Mahmud JC:

Introduction

[1] This is an application for revision by the Public Prosecutor, of the decision of the learned Sessions Court Judge in ordering the case (Sessions Court Reference No. JC-62JSK-05-04-2019) to be *de novo*, *vide* a letter to the learned Senior Assistant Registrar of the High Court in Muar.

[2] After perusing over the letter, I decided to call for the records of the Sessions Court (Reference No. JC-62JSK-05-04-2019) pursuant to s. 35 of the Courts of Judicature Act 1964. Section 35(2) of the said Act provides that "Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court".

A **Background Facts**

[3] The respondent was charged, at the instance of the Public Prosecutor, under s. 376(1) of the Penal Code on 28 April 2019 before the previous learned Sessions Court Judge, Tuan Mazelan bin Jamaluddin ("the previous learned Sessions Court Judge"). The respondent was and still is represented B by the National Legal Aid Foundation, in the person of learned counsel, Mr Syaffie bin Naim.

[4] Four prosecution witnesses were called, and at the end of the prosecution's case, on 4 October 2020, the previous learned Sessions Court Judge ruled that the prosecution has made out a *prima facie* case against the C accused and ordered the accused to enter his defence. The defence proceeded to call the accused to the witness stand and closes its case on 7 February 2021.

[5] The previous learned Sessions Court Judge then fixed 22 March 2021 D for the prosecution to file their submissions and on 27 April 2021 the defence applied for an extension for time to file their submissions because they just received the prosecution's submissions. The decision was fixed on 14 June 2021 but the decision had to be postponed due to the movement control order which was a Government effort to control the spread of an illness E known as Covid-19 which is spread by a coronavirus known as SARS-CoV-2 virus.

[6] By then the previous learned Sessions Court Judge Tuan Mazelan bin Jamaluddin was transferred to Kuala Lumpur Sessions Court and his post was assumed by the succeeding Sessions Court Judge, Tuan Azman bin F Mustapha, effective 15 June 2021. The decision at the end of the defence case was further adjourned to 8 July 2021 and again to 28 July 2021.

[7] Sad news came on 27 July 2021 when the previous learned Sessions Court Judge who heard the case, Tuan Mazelan bin Jamaluddin returned to the grace of His Lord and hence the decision could not be delivered.

G **[8]** On 29 July 2021 the case was called up by the succeeding Sessions Court Judge in the person of Tuan Azman bin Mustapha to ascertain the status of the case. The learned Sessions Court Judge enquired from parties on the views of parties in respect of the case. The defence applied to have the case heard *de novo*. No ground was offered.

H **[9]** It was vehemently opposed by the prosecution on the grounds that:

(i) The prosecutrix (victim) will have to re-testify and this would cause a repeat of the trauma that she had gone through earlier not to mention the incident itself and the prosecution's case.

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(ii) The prosecutrix has since married and a retrial would add pressure on her marriage and put her to shame with her in-laws, notwithstanding the proceedings may be conducted *in camera*.

(iii) The records of proceedings may be viewed either in the form of video recording or the cold print of the notes.

(iv) If the defence is dissatisfied with the prosecution's case, they are entitled to appeal to the High Court.

(v) A trial heard *de novo* is not only a waste of time and resources but it is also a form of "double victimisation" of the prosecutrix.

(vi) Re-visiting the decision of the earlier Sessions Court Judge, in calling for the defence to be entered, is contrary to law since it is the decision of the same court notwithstanding the change in personality (coram) presiding over the court.

[10] The case of *Abdul Hamid Udin v. PP* [2000] 1 LNS 198; [2000] 6 MLJ 334 was cited in support.

The Law In Respect Of The Exercise Of Revisionary Powers Under Sections 35 of the Courts Of Judicature Act 1964 And 325 of the Criminal Procedure Code

[11] The powers of revision by the High Court are found in s. 31 of the Courts of Judicature Act 1964 and s. 325 of the Criminal Procedure Code.

Courts of Judicature Act 1964

31. Revision of criminal proceedings of subordinate courts

The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

Criminal Procedure Code

325. Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[12] The provision of the law that explains this is s. 323 which reads as follows: "A Judge may call for and examine the record of any proceeding before any subordinate criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate court".

[13] The High Court's power of revision clearly spelled out in ss. 31 and 35 of the Courts of Judicature Act 1964 and ss. 323 and 325 of the Criminal Procedure Code. I am reminded that in a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with, only in very exceptional circumstances, to prevent a miscarriage of justice and confined myself to errors of law and procedure only.

[14] Hence to exercise this vast powers, the principles of law are enumerated as follows:

(i) Powers exercised by the High Court over the Subordinate Courts exercising criminal jurisdiction.

(ii) The purpose of satisfying itself as to the:

(a) correctness;

(b) legality; or

(c) propriety.

of any finding, sentence or order recorded or passed by the subordinate criminal court

OR

(iii) The regularity of any proceedings of that subordinate court.

[15] In the case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69, the Supreme Court discussed at length the powers of revision exercisable by the High Court. On the object of revision, it quoted the Indian case of *Emperor v. Nasrullah & Ors* AIR (1928) All 287 which says that the object of revisionary powers is:

> ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

[16] It is well-established law that the court will generally exercise its revisionary powers where the lower court fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public. The primary objective of a revision is to correct a miscarriage of justice which has affected the applicant and the High Court's powers of revision are to be exercised sparingly and judiciously. (See *PP v. Sogas Trading* [2020] 4 CLJ 410).

[17] The application for revision must be done at the first possible moment and not after other methods of procedure have been unsuccessfully adopted (see *Dorai Manickam Alias Davis v. Rex* [1936] 1 LNS 12; [1936] 1 MLJ 209).

[18] In *Dorai Manickam*'s (*supra*) case, where an applicant has had the opportunity to appeal but neglects to do so, the court should not exercise its powers of revision unless there are very good reasons for that neglect.

[19] It is not desirable or possible to lay down hard and fast rules as to when this court will or will not exercise its powers of revision under s. 325 of the Criminal Procedure Code. Each case must be decided according to its own circumstances. It may, however, be laid down as a broad and general rule that where a party to criminal proceedings has had the opportunity to appeal under s. 302 or s. 317 of the Criminal Procedure Code but neglects, without very good reasons, so to do he will not be allowed to invoke the provisions of s. 325 and, moreover, that where it is proper that application be made to the court to exercise its powers under that section the application should be made at the first possible moment and not merely as a forlorn hope after other methods of procedure have been unsuccessfully adopted. (See *PP v. Sogas Trading* [2020] 4 CLJ 410).

[20] The decision in *Dorai Manickam* (*supra*) was quoted with approval by the Court of Appeal in *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 where His Lordship Justice Gopal Sri Ram (for the Court of Appeal) said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v. R* [1936] 1 LNS 12; [1936] MLJ 261.

[21] Later, in the case of *Muzammil Izat Hashim v. PP* [2009] 2 CLJ 354 the same court had occasion to consider the issue of whether the appellant can seek the revisionary powers of the High Court when the appellant failed to

appeal against an order made by the Sessions Court under s. 51 of the Criminal Procedure Code. In dismissing the appeal His Lordship, Justice Hasan Lah (for the Court of Appeal) stated the following:

> [8] In his judgment the learned High Court Judge referred to and relied on the decision of the Supreme Court in *PP v. Raymond Chia Kim Chwee & Anor* [1985] CLJ (Rep) 260; [1985] 2 MLJ 436 *where it was held inter alia that a decision or order made under s. 51 of the Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307 of the Code.* The other case referred to by the learned High Court Judge in his judgment is *Dorai Manickam v. R* [1936] 1 LNS 12; [1936] MLJ 261 *where it was held that where a party to criminal proceedings who has had the opportunity to appeal neglects, without very good reasons, so to do, he will not be allowed to call in aid the High Court's revisionary powers.*
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> ...
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> [12] Learned counsel for the appellant also submitted that the principle of law stated in *Dorai Manickam*'s case is a bad law because the High Court is conferred with extensive powers of revision in criminal proceedings under s. 323 of the Code and s. 35 of the Courts of Judicature Act 1964 and alternatively he submitted that *Dorai Manickam*'s case does not set out that principle of law at all. *We found no merit in that argument. Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable and no appeal has been lodged.* In *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 at p. 219 Gopal Sri Ram JCA said:
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> > *The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged. Dorai Manickam v. R* [1936] 1 LNS 12; [1936] MLJ 261. (emphasis added)

[22] In *Hari Ram Seghal v. PP* [1980] 1 LNS 116, the High Court exercised its revisionary powers to quash a conviction and sentence passed by the Magistrate's Court as the records of appeal have become unobtainable. In considering whether to order a retrial, His Lordship, Justice Wan Yahya (as he then was) noted that the prosecution was blameless in this unfortunate episode. His Lordship observed that what the court was concerned at that stage was not so much as to the verdict of the prosecution's or the Magistrate's fault, but how to provide a just remedy to the applicant's case.

Duty Of High Court

[23] Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court.

[24] Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the judge ought to call for and examine the record with a view to exercise the revisionary power to correct a miscarriage of justice. (See *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163).

Power Is Discretionary

[25] The High Court's power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation. "Discretion" is defined in the *Words and Phrases Legally Defined*, 2nd edn, vol. 2, at p. 82 to read:

> 'Discretion' means that when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* [1598] 5 Co. Rep. 996); according to law, and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* [1792] 4 Term Rep. at p. 757). (*Sharp v. Wakefield* [1891] AC 173, HL, per Lord Halsbury LC at p. 179).

(See *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163).

[26] *Maxwell on the Interpretation of Statutes*, 12th edn, at pp. 147 to 148, under the heading "The exercise of discretions must be reasonable", states that:

> *Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be 'regulated according to known rules of law.'* (*Lee v. Bude & Torrington Junction Ry. Co.* [1871] LR 6 CP 576, per Justice Willes at pp. 580, 581), *and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet* ... 'It is true,' said Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at p. 229), *'the discretion must be exercised reasonably'*.

[27] The principles which should guide the courts in the exercise of the revisionary powers have been clearly set out by Chief Justice Jenkins in *R v. Lachiram* ILR 28 Bom 533. In that case His Lordship said that this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

[28] In *Re Soo Leot* [1955] 1 LNS 127, His Lordship Justice Buhagiar following the principles laid down by Chief Justice Jenkins in *R v. Lachiram* ILR 28 Bom 533, held that the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case. (See *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163).

The Issues In This Application

(i) Whether a Sessions Court may alter its decision after it has made a finding that a *prima facie* case has been made out by the prosecution.

(ii) Whether a change of judge entails an order that a trial be heard *de novo.*

(iii) Whether the justice of the case demands that the case be heard *de novo.*

I shall deal with the issues accordingly.

(i) Whether A Sessions Court May Alter Its Decision After It Has Made A Finding That A Prima Facie Case Has Been Made Out By The Prosecution

[29] There are provisions of law that allowed changes in presiding judge. In the legal and judicial service, it is not uncommon for presiding judges to be transferred elsewhere or to a different department altogether.

[30] The provision that I wish to refer is s. 261 of the Criminal Procedure Code which reads as follows:

> 261. Change of Magistrate during hearing
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> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
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> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
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> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

[31] This provision provides for: A

(i) any Magistrate after having heard and recorded the whole or any part of the evidence in a trial;

(ii) he ceases to exercise jurisdiction in it;

(iii) he is succeeded by another Magistrate who has and who exercises such jurisdiction; and B

(iv) the Magistrate so succeeding may act on the evidence:

(a) so recorded by his predecessor;

(b) partly recorded by his predecessor and partly recorded by himself; or C

(c) he may re-summon the witnesses and recommence the inquiry or trial.

[32] In the exercise of these powers, there are certain additional latitude D provided for by the law to afford the accused person a fair trial which are in the provisos:

(i) the accused may, when the Second Magistrate commences his proceedings, demand that any of the witnesses be resummoned and re-heard; E

OR

(ii) the High Court may set aside any conviction that was made on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that court is of opinion that the accused has been materially F prejudiced thereby, and may order a new trial.

[33] There are differences in the exercise of the powers of the trial court and that of the appellate court.

[34] There are views that the trial should be heard *de novo* by the trial court G but I am unable to see what the basis of such exercise is.

[35] The provision of "(a) ... the accused may, when the Second Magistrate commences his proceedings, demand that any of the witnesses be re-summoned and re-heard;" was there when the Criminal Procedure Code was first introduced in 1935 when it was known as Criminal Procedure Code H 1935 (Federated Malay States Chapter 6); it has gone through quite substantial amendments over the period spanning almost a century but s. 261 has not had that privilege. It was still in the form when video recording in courtrooms was beyond the imagination of even the most innovative judges. Charlie Chaplin no doubt, had his heydays during the time but who would I have thought of using a similar facility for the courtroom.

[36] When we have the video recordings, it facilitates the viewing of witnesses' testimonies like never before. Even judges are up for scrutiny on their conduct in open court. Witnesses are more so. Recalling witnesses for the sake of analysing demeanour has taken a backseat in the judicial bus on the trip to reach justice. Demeanour may now be seen at first instance except in rare circumstances where the recordings are lost or pictures too fuzzy to make out what transpired in courtroom or the files were corrupted.

[37] As the lives of man in society evolved and progressed with time and technology, so too must the interpretation of law and their applications. Legislature finds it fit and proper to maintain the provision which is our parachute in event that all else failed on the plane in the flight to justice (an updated version of the bus trip). As much as a parachute is not for the normal passenger, so is the proviso of s. 261 which reads "(a) in any trial the accused may, when the Second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and re-heard;".

[38] In *Yap You Jee v. PP & Other Appeals* [2015] 7 CLJ 897 the facts were that the three appellants were initially charged with various offences under s. 420 and s. 109 of the Penal Code and were tried in the Sessions Court. At the close of the prosecution's case, the prosecution applied to amend the charges against all the appellants. The amendment entailed the insertion of common intention under s. 34 of the Penal Code and the particularisation of the deception. Alternative charges were also preferred against all the appellants. As against the third appellant, there was an additional charge. The previous Sessions Court Judge ('the previous SCJ') allowed the amendment of the charges and found that the prosecution had made out a *prima facie* case on one amended charge against the first appellant, on three amended charges against the second appellant and on one amended and one additional charge against the third appellant. The appellants were ordered to enter their defence on the amended charges. The previous SCJ was subsequently transferred and no written grounds were provided for the *prima facie* case finding. The defence was heard by a new Sessions Court Judge ("the succeeding SCJ"). All three appellants gave evidence under oath. At the end of the defence case, the succeeding SCJ found that the appellants had failed to raise a reasonable doubt on the prosecution's case. In her grounds of judgment, the succeeding SCJ stated that since she had been directed to continue at the defence case, there was no need for her to re-visit or review the prosecution's case, which had been considered by the previous SCJ in deciding that the prosecution had made out a *prima facie* case against the appellants. The succeeding SCJ convicted and sentenced the appellants to various terms of imprisonment. Each of the three appellants appealed to the High Court. The High Court, however, affirmed the convictions and the sentences imposed by the succeeding SCJ. The appellants appealed to the Court of Appeal. The main

grounds of appeal concerned: (i) the amendment of the charges; (ii) the absence of the grounds of judgment by the previous SCJ at the end of the prosecution's case; (iii) the application of s. 261 of the Criminal Procedure Code ("CPC"); (iv) the error on the part of the succeeding SCJ in failing to reconsider the prosecution's case and in dealing with only the defence case; (v) whether a statement (exh. P97) made by one Raizul incriminating the second and third appellants was properly admitted under s. 32 of the Evidence Act 1950 notwithstanding failure by the police to use ss. 47, 49, 118 and 396 of the CPC; (vi) the subject matter of the charges; and (vii) the credibility of a witness (SP17) whose evidence was not in favour of the prosecution.

[39] The Court of Appeal held that:

> [40] We agree that pursuant to s. 261 of the CPC, the succeeding Sessions Judge has a complete discretion to either hear the case *de novo* or to continue from the point where it has been left by the previous Sessions Judge. However we do not agree that the "directive" given to the succeeding Sessions Judge amounts to a breach of the provisions of s. 261. It has been a practice for the Chief Judge or the Chief Registrar to decide on whether the part-heard cases would be completed either by the previous presiding Magistrate or Sessions Judge or by his successor and this decision or 'directive' was purely administrative, given with the primary purpose to speed up the disposal of the part-heard cases. The "directive" which was given administratively could not and did not in any way fetter the discretion of the succeeding Magistrate or Sessions Judge provided for under s. 261 of the CPC. The duty remains on the Magistrate or the Sessions Judge to act under the provisions of s. 261 of the CPC. In particular, if the succeeding Magistrate or Sessions Judge acts on the evidence which has been recorded by his predecessor, the right to recall witnesses must be observed. In this appeal, we find no issue on the right of the appellants to recall witnesses. In the circumstances, the 'directive' given to the succeeding Sessions Judge has not prejudiced the appellants and has not breached s. 261 of the CPC.

[40] I take note in the learned judgment of the Court of Appeal, Her Ladyship Justice Tengku Maimun Tuan Mat (now Chief Justice) was of the view that "We agree that pursuant to s. 261 of the CPC, the succeeding Sessions Judge has **A Complete Discretion** (emphasis added) to either hear the case *de novo* or to continue from the point where it has been left by the previous Sessions Judge …".

[41] The key word is "discretion".

[42] "Discretion" is defined in the *Words and Phrases Legally Defined*, 2nd edn, vol. 2, at p. 82 as "that when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion".

[43] The *Cambridge Dictionary* (Cambridge University Press 2021) defines "discretion" as "the right or ability to decide something:" or "choice, or the right to make a choice, based on judgment:".

[44] While the right or ability may be exercised, when it comes to authority conferred by law, it has to be exercised "judiciously", ie, the exercise of the choice be done with a proper reason. There must be justification(s) for the exercise of that choice since it is not personal in nature and not for personal matters too but a choice made in judicial capacity that calls for accountability and reason(s).

[45] Hence in *Lee v. Bude & Torrington Junction Ry Co* [1871] LR 6 CP 576, per Justice Willes at pp. 580, 581 it was ruled that "Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be 'regulated according to known rules of law'. A discretion is not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet ...".

[46] "It is true", said Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 at p. 229, "the discretion must be exercised reasonably".

[47] In *Emperor v. Bar Council Of Gujarat* AIR 1981 SC 477, the Advocates Act 1961 provides that if on a receipt of a complaint against an advocate, the State Bar Council has "reason to believe" that the advocate has been guilty of misconduct, it shall forward the case to the disciplinary committee. It was held by the Supreme Court that in forwarding a case to the disciplinary committee the council cannot act mechanically. It must apply its mind to find out whether there is any reason to believe that any advocate has been guilty of misconduct only when the Bar Council has a reasonable belief that there is a *prima facie* case of misconduct, a disciplinary committee, is to be entrusted with inquiry against the concerned advocate.

[48] In *R v. Metropolitan Police Commissioner* [1968] 2 QB 118, the court held that the transport authority was bound to renew the licence of taxi-drivers if certain conditions had been satisfied.

[49] In *Balasingham v. PP* [1959] 1 LNS 8, His Lordship Justice Ismail Khan (later Chief Justice of Borneo) said "The trial court is under a statutory obligation under s. 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a "speaking" judgment needs no emphasis".

[50] A speaking judgment is a judgment with reasons. Hence when the court exercises its discretion, it cannot be done wantonly or callously but with good reasons or foundation for that decision is arrived at. Likewise if it is an order or a ruling. It must be with reasons and those reasons must be judicious.

[51] In fact in *Murugiah v. PP* [1940] 1 LNS 59; [1941] MLJ 17b and *Rex v. Low Toh Cheng* [1941] 1 MLJ 1 both Their Lordships, Justice Horne and Acting Chief Justice Terrell felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial judge in arriving at the ultimate finding.

[52] In *Adzhaar Ahmad & Anor v. PP* [1996] 1 LNS 68 His Lordship Justice Alauddin spelt out what it takes to be a reasoned decision and His Lordship said this:

> With the greatest of respect to the learned Sessions Judge, I am compelled to say that his judgment is most inadequate and far from being a speaking judgment. He had failed to discuss the evidence and the probabilities arising from the circumstances of the case. He had failed to state the reasons for his findings. At times, he made no finding of facts in respect of the evidence of witnesses. In his judgment, he had failed to indicate that he had in fact applied his mind to the evidence produced.

[53] I am unable to find the reason(s) of the learned Sessions Court Judge for the exercise of his discretion. There are legal ramifications which are among others:

(i) The prosecutrix will be forced to be examined again.

(ii) The evaluation of evidence after the previous Sessions Court Judge ruled that the prosecution succeeded in proving a *prima facie* case.

(iii) The defence has closed its case after calling its witnesses although no decision has been made.

[54] There are other ramifications apart from being legal, in that a recalling and re-examining the prosecutrix may throw the marriage of the prosecutrix to the rocks.

[55] It must be remembered that when a decision has been made in respect of evidence such as a *prima facie* case has been made out by the prosecution.

[56] I am guided by the Court of Appeal in *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 where it was ruled that:

> A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. *The moment the prosecution has proved its*

case meaning that the court has decided that there is a case for the accused to answer and the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right or wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand if he is acquitted at the end of the case for the prosecution that means that the court has decided the fate of the accused and that as far as that court is concerned the accused is a free man. *Similarly when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the Sessions Court Judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court Judge has done. Only after he has heard the defence and only then can he finally decide the fate of the accused.* (emphasis added)

[57] In our instant case, since the earlier Sessions Court Judge ruled that there has been a *prima facie* case against the accused, it must be taken to the end. It is not for the succeeding Sessions Court Judge to rule otherwise, no matter what his personal thoughts are. He may choose to do so at the end of the defence case but certainly on setting aside *ab initio* of his sitting before hearing the defence witnesses. He must, in the words borrowed from *Saad Abas* (*supra*) that "it is as good as saying that the Sessions Court Judge himself has decided to call for the defence assuming that he has analysed the case in the way that the preceding Sessions Court Judge has done".

[58] Having said that I must say, for the sake of completion, lest I be said to overlook an important point. I can quite agree that a recall of the defence witnesses so they can be presented to the new presiding Sessions Court Judge and this may be done without expunging the records.

[59] Hence the witnesses so recalled is subject to scrutiny and they may be subject to impeachment if they gave a different version than what is on record.

[60] His Lordship Justice Abdul Malik Ishak had this to say in *Mohd Jalani Saliman & Anor v. PP* [1998] 1 CLJ 123, *inter alia*:

> My attention was drawn to the case of *Murugaiah v. Public Prosecutor* [1941] 10 MLJ (FMSR) 17 where Horne J in a short judgment said:
>
> > *It does not appear to me that a Magistrate complies with s. 307(iii) of the Criminal Procedure Code which requires him to give the 'Grounds of Decision' by stating 'I believe the evidence of the prosecution' … 'I believe the evidence of the accused.' I think the Magistrate should state, except in the simplest of cases and they usually are not the subject of appeal, the reasons why he believed or disbelieved the evidence in question.*

and flowing from that case it was argued that the trial court admitted that the case was protracted with massive documents to peruse and not as simple as one would imagine. Therefore, it was submitted that it was incumbent on the trial court to dissect and itemise the evidence for the prosecution on the same lines as that adopted by Salleh Abas LP in *KJ Barlow v. Public Prosecutor* [1987] CLJ 139; [1986] 2 MLJ 104 SC.

I have read the judgment of the trial court from pp. 283 to 290 of the appeal record. It was a compact judgment that went straight into the subject matter of the charges levied against the appellants. The trial court referred to the relevant exhibits and linked those exhibits with the three charges. The trial court too highlighted certain aspects of the evidence to link it with the charge of cheating. The judgment of the trial court was not like what was done by the Magistrate in *Murugaiah*'s case. The judgment of the trial court can never be compared to what the Magistrate did in *Murugaiah* which received the adverse comments of Horne J. It would be most unfair and wrong to equate the remarks of Horne J in *Murugaiah* to the judgment of the trial court. *Magistrates need not write lengthy judgments in the course of their duties. Suffice if Magistrates put the facts and the law on paper as concisely as possible. In my judgment, there was nothing wrong with the way the trial court wrote the judgment. Although the trial court did not give an explanation as to the law involved yet the findings were in accordance with the law which showed that the appellants had committed the offences with which they were charged (Tee Thian See v. Public Prosecutor [1997] 5 CLJ 654). What amounts to a "speaking judgment" varies from case to case and from Magistrate to Magistrate. Even judges too are apt to differ and hold onto different notions on what can be considered to be a "speaking judgment".*

It is a correct statement of the law to say and I so say that there is no statutory provision that requires the trial Magistrate to expressly record the reasons for calling the defence. The Supreme Court in the case of *Abdullah v. Public Prosecutor* [1984] 1 LNS 3 had occasion to consider the acid issue of whether it was mandatory for the trial judge to record the reasons for calling an accused to enter the defence. In answering the question posed in the negative, Mohamed Azmi SCJ (now FCJ) had this to say:

> *In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial; established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this*

A *appeal, the establishment of a prima facie case of unlawful possession of a firearm under s. 57 of the Act was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s. 180 of the Code. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer which, if unrebutted, would warrant a*
B *conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court.*

(emphasis added)

C **[61]** In my view, the learned Sessions Court Judge did not indicate the reason for his decision notwithstanding the legal ramifications of his decision.

[62] Hence, it does not fulfil the meaning of "exercise of discretion" which cannot be exercise wantonly or callously but with reasons that could
D withstood the test of scrutiny.

(ii) Whether A Change Of Judge Entails An Order That A Trial Be Heard De Novo

(iii) Whether The Justice Of The Case Demands That The Case Be Heard De Novo

I shall deal with both issues together.
E

[63] This point was discussed by His Lordship Justice Abdul Wahab in *Abdul Hamid Udin v. PP* [2000] 1 LNS 198:

At the outset of the hearing of the appeal, it was argued for the appellant, on the basis of s. 261 of the Criminal Procedure Code ('the Code'), that
F the appellant was materially prejudiced because the prosecution case was heard before Puan Suraya bt Othman, and the defence case was heard before another judge, Tn Abd Karim bin Jalil.

It is always very highly desirable that judgment in any case should be given by the judge who has heard and recorded all the evidence himself and has heard and seen the witnesses (see *Chong Kwee Hian v. PP* [1948] 1 LNS 10; [1948-49] MLJ
G Supp 191). *Would that it be that all that is desirable will come to pass. However, judges may move on or be transferred, and no longer exercise jurisdiction in a case. Provision in the event of changes of trial Magistrates and judges in the Sessions and Magistrates' courts* (see *PP v. Mohd Jon* [1993] 1 MLJ 133) is therefore made in s. 261 of the Code:

H *Change of Magistrate during hearing*

Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his
I *predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:*

Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

(b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had ..., if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

Nevertheless the fact remains that a trial judge taking over a trial from another judge would be very much at a disadvantage when he does not have the means of assessing the demeanour of the witnesses so far called (see PP v. Mohd Jon). It is self-evident that the disadvantage exists only where the demeanour of witnesses is important in the assessment of the evidence of the particular witness. It is not so important in the case of more or less formal witnesses (see Mohamed Idris bin Haji Mohamed Said v. R [1948] 1 LNS 35; [1949] MLJ 31). In other words, demeanour is not always a determining factor in the assessment of the testimony of a witness. In Mohamed Idris bin Haji Mohamed Said v. R it was also recognized there may be cases where the succeeding judge has no option but to rely on the recorded testimony if the witness cannot be found. The extent to which the succeeding judge can rely upon the recorded testimony and the weight to give to it must depend upon the nature of the recorded testimony, and the challenge it is subjected to. If the personal credibility of the witness is challenged, his demeanour would be material. An incoming judge would not necessarily be aware if demeanour of any particular witness is important by a reading of the record, unless a note of the demeanour is recorded in accordance with s. 271 of the Code which provides:

Remarks as to demeanour of witness

A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence and at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Where a judge recording the evidence had not found it necessary to record the demeanour of a witness as so provided, then it is fair and reasonable to conclude that the trial judge did not view that demeanour in court of that witness is a very important factor in assessing his credibility. In such a case, the recorded evidence is an adequate presentation of his evidence. Of course a trial judge may consider demeanour in his decision even though he had not seen it necessary to record his impressions of the demeanour under s. 271, such demeanour cannot be as influential as demeanour he has seen fit to record.

If the accused is anxious that demeanour should be considered, proviso (a) of the section provides that he may in such cases demand that any of the witnesses be re-summoned and re-heard. Such demand would make demeanour into an issue to be considered. Otherwise, consideration of the sworn testimony without reference to demeanour is not by itself a fatal flaw. It must first have been put in issue.

Where no such demand is made, the judge makes his own assessment, as provided by s. 261 from the record as to whether to:

(a) act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or

(b) he may re-summon the witnesses and recommence the inquiry or trial.

A perusal of the record of the prosecution case does not show anything obvious or manifest upon it that makes it necessary for the succeeding judge to exercise the discretion on his own to resummon the witnesses and recommence the trial. Although the succeeding judge did not give written reasons, it is clear from a reading of the record that the judge was not manifestly wrong to be satisfied with the testimony on the record. Indeed he was supported in that conclusion in that no demand was made by the appellant for any of the witnesses to be recalled and reheard when the succeeding judge commenced his proceedings. (emphasis added)

[64] The observations of His Lordship Justice Abdul Wahab was very true in the good old days when the only records that was authoritative, were the handwritten notes of the presiding judge.

[65] That has come to pass. Today and it is true for this case, there are video recordings that has the audio as well as video recordings that is at the disposal of the succeeding judge.

[66] I find that considerations should have been given on this fundamental point because even the CPC has been amended to include the video recording as records of proceedings and appellate courts have, more than once, resort to this mode of evidence evaluation.

[67] Hence, the excuse that demeanour could not be observed, is a dinosaur that has been fossilised by the avalanche of technology (that has been put into good use, no doubt) and whose bones are studied by students of legal archaeology to remind us of the millennia that we no longer have to bear its burden.

Conclusion

[68] Having perused over the records, and after hearing parties, I find that the order/ruling of the learned Sessions Court Judge is improper and illegal as well as incorrect in face of the law and the facts of the case and for the reasons aforesaid, I decided that I must exercise the revisionary powers of this court and I make the following orders:

(i) The order of the learned Sessions Court Judge to have the trial *de novo* be set aside.

(ii) The ruling by the previous Sessions Court Judge that the prosecution has made out a *prima facie* case against the respondent/accused is restored.

(iii) The defence may call their witnesses to the stand and the provisions of s. 173 of the CPC must be complied with, in particular, s. 173(ha) onwards and of course, of any other law in force.

(iv) The presiding Sessions Court Judge will then evaluate the evidence and make the necessary ruling at the end of the defence case.